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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 696

R. D. MCALLISTER & SON, a Partnership, and IRENE MARKOPOLOS, *Petitioners*

v.

CITY OF ERIE, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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R. D. McAllister and Son, a partnership, and Irene Markopolos, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this case on July 1, 1964, and re-argument thereon refused July 17, 1964.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania, as appended hereto, is not yet reported in any official or unofficial reports. The opinion of the lower court or original court of jurisdiction (Court of Common

Pleas of Erie County), which was adopted per curiam by the Supreme Court of Pennsylvania, is also not yet reported in any official or unofficial reports.

JURISDICTION

The jurisdiction of the United States Supreme Court to review this judgment is pursuant to Title 28, United States Code, Section 1257, (3), by writ of certiorari.

The date and time of entry of the judgment is July 1, 1964.

A petition for re-argument to the Supreme Court of Pennsylvania was duly filed and refused by order of July 17, 1964.

An extension pursuant to application therefor of the time within which to petition for certiorari was granted on September 28, 1964, by Mr. Justice William J. Brennan, allowing through November 16 1964, for filing.

QUESTIONS PRESENTED

(1) Where petitioners' predecessors in title to real property entered into an agreement, (lawful when made), with the municipality wherein the property is located, agreeing to keep contiguous public property or docks in repair "in lieu of taxes and assessments", and thereafter the case law and Constitution of Pennsylvania changed and proscribed such agreements, may the municipality now impose the duty of repair of public property upon the successors in title of the contiguous private property and a perpetual lien for future repairs of the public property upon the private property, or is not this a clear violation of the Constitution, being a taking of property without just compensation and without due process.

(2) Since the land above referred to is water lots, and the public property and the public dock, is not this imposition on private owners of the perpetual duty to repair the public dock also in this peculiar situation a violation of the Constitution through the interstate commerce clause.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA

Bill of Rights, Amendment V:

> "...; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Article 1, Sec. 8, Clause 3. "Interstate Commerce Clause":

> "The Congress shall have the power . . . To regulate Commerce with foreign Nations, and among the several States, ..."

Article I, Sec. 9, Clause 6:

> "No preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties to another."

Collaterally:

CONSTITUTION OF PENNSYLVANIA

Article IX, Sec. 1:

> "All taxes shall be uniform, upon the same classes of subjects, . . .; but the General Assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, ..."

(See Appendix B, Purdon's Penna. Statutes Annotated, Constitution, p. 119 Laws of Pennsylvania, 1874, p. 19.)

Article IX, Sec. 2:

> "All laws exempting property from taxation, other than the property above enumerated, shall be void."

(Purdon's Penna. Statutes Annotated, Constitution, p. 171 Laws of Pennsylvania, 1874, p. 20.)

STATEMENT

This unusual case begins with the very founding of Erie, Pennsylvania, shortly after the Indians moved out of the territory, and involves the factual background through the development of Erie into a commercial and yacht harbor.

Some geographical orientation may be beneficial. Erie is located on the south side of Lake Erie about 95 miles westwardly from the eastern extremity of the Lake. A peninsula having its neck on the south side of the Lake, known as Presque Isle, juts out northeastwardly and half-circles an area into a bay, known as Presque Isle Bay, roughly four miles in length, east

and west. This lake or bay-front is the site of original Erie.

When the town was in its infancy the State Legislature incorporated the same into a borough in 1805, authorizing burgess and council to sell at public auction lots in the bay at the center bay front of the Borough, with the express power to convey fee simple title, and providing the proceeds were to be devoted to the use of the borough generally, and the lots to the building of wharves and landings.

Following through with the expansion and prosperity of Erie, the water lots were sold to defendant predecessors in title commencing in 1807 (Record, 9a). These original lots were roughly 33 feet in width (east and west), and 122 feet in length (north and south or extending into the bay) (Record, 9a, 36a).

Apparently with the growth of waterfront activity, including contemplation of the Erie Extension Canal, (Record, 66a), it was determined to extend out into Presque Isle Bay beyond the original lots through the creation or building of an additional protection within the protection afforded by Presque Isle or the peninsula, or through the building of a pier or breakwall to form what are now referred to as the east and west canal basins at the foot of central Erie (Record, 10a).

With this background the Borough and some of the founding fathers that had purchased the water lots entered into a contract herein referred to as the "1837 Agreement" (Record, 10a and Exhibit E, 35a). The abortive agreement changed the location of the water lots purchased at auction to a more northward position into the bay, and granted to said owners a right to build or fill in lines parallel to their original lot lines

a distance of 200 feet southwardly from the outer pier or breakwater. The mutual considerations in this agreement are important, but basically the Borough had the pier widened and the canal basins stabilized through the filling in from the south side of the pier, taxable land area was formed, and the owners agreed to pay assessments and taxes on the lots which were to be devoted to keeping the pier and bridge (now State Street) in repair (Record, 40a).

Nine years later the "1837 Agreement," being disputed in interpretation in the areas of the duties and rights of taxes and repair, was amended or supplemented by a contract, being the instrument now being enforced by the City, herein referred to as the "1846 Agreement" (Record, 12a and Exhibit F, 43a). Again the original lots were moved northwardly or further into the bay, and again, in addition to mutual consideration, is the basic reference to taxes and the duty to repair, except that on this occasion rather than the Borough using the taxes to repair its pier, the reverse was applied, and the lot owners assumed the duty of repair of the pier within their extended lateral lines in consideration of or for an exemption from the reasonable taxes and assessments as mentioned in the "1837 Agreement".

The balance of the material facts are more economic fact than what is ordinarily thought of as statement of a case, with some lapses or voids.

For instance, commercial shipping changed from wooden bottoms, iron men, and sails, into huge steel ships with mechanical power so that the canal basins became docking and mooring areas for smaller fishing and yachting type vessels. The extension canal failed

and was closed or abandoned, and the fishing fleet largely disappeared. The bridge referred to in the contract is now lower State Street. The lots adjoining the piers are now occupied by yachting and resort businesses, where not the empty, and the pier is part of the public way at the waterfront, largely covered by concrete or asphalt, and commercial lading and unlading thereon is an archaic expression for old fishermen's tales.

In 1858 the landmark case of *Mott* v. *Pa. R.R. Co.* determined that general tax exemptions as bargaining units were contrary to public policy and the same soon became part of the Pennsylvania Constitution, (1874).

The lots with the inevitable passage of time became known as the "inshore water lots", meaning the original lots auctioned, on the south side of the canal basins and contiguous to the mainland of Pennsylvania, and the extensions on the north side of the basins became known as the "outshore water lots", losing their identity as rights appurtenant to the parent lot through time and separation of identity of ownership after the Constitutional change.

Research of the tax records failed to disclose any enlightenment on whether borough real estate taxes were collected before 1858 or not on the lots (Record, 4a), but it is known that petitioners have paid city and school real estate taxes for many years on the properties known as "outshore water lots", aggregating to very substantial amounts of money, (Record, 14a).

Other owners in the past at times have repaired portions of the public pier continguous to their properties (Record, 17a), and the Commonwealth and the

City may have at times in the past repaired the roadway surfacing the pier or the dock face in places (Record, 17a). In 1909 the Commonwealth constructed the public dock, also known as the "Public Steamboat Landing", now "Dobbin's Landing" at the foot of State Street or apex of the original T-pier, and transferred the same to the City (Record, 17a).

Additionally, the opening of the St. Lawrence Seaway has had its impact on the Port of Erie. To accommodate international shipping and ocean draft vessels the state and federal governments have expended millions of dollars on the harbor generally, including sums for lowering or dredging the bay bottom. Maintenance of the public dock has further become dispropotionate to the original intent, i.e., to lower the bottom of the basket has its effect on the sides,

Petitioners, one being in the yacht and marine sales and servicing business, and the other in the restaurant business, are present owners of some of the outshore water lots contiguous to the pier through various types of conveyances to date (Record 7a).

The extent of the present complete and constant public use of the pier and adjacent 30 feet is undisputed (Record, 17a), and is demonstrated by Exhibit "I" (Record, 23a). This photograph also demonstrates the extent of erosion, decay, and peril, before the parties came to court in this action, being the result of lack of maintenance or repair for many years (Record, 16a), although most of the area in question was not acquired by petitioners until quite recently (Record, 7a).

The case was commenced by the City of Erie by declaratory judgment, without objection procedurally,

and followed by a lengthy stipulation in lieu of other pleadings and proof.

In the initial brief, which was devoted largely to trying to explain the complicated facts and bacl ground, the Pennsylvania Constitutional problems were raised. In the exceptions to the Court of Common Pleas of Erie County, Pennsylvania, for argument and brief before that court of first instance sitting in banc, the precise federal questions as are herein sought to be reviewed were raised, (Record 87a).

The same federal questions were then raised upon direct appeal to the Supreme Court of Pennsylvania, being the third of three questions involved, numbered "C", and reviewed in further detail in that appellate brief.

The Court of Common Pleas or court of first instance merely affirmed itself, as generally occurs. (Record, 4a), never indicating it had considered the federal questions.

The Supreme Court of Pennsylvania, after several months passage of time between the agreement before it and its opinion, apparently through the inadequacy of the writer in being able to get the real issues through to that Court, merely again affirmed the first opinion of the lower Court, adopting the same, Appendix A. This is unusual for the Supreme Court of Pennsylvania. In reality there has been no review by any court of the federal questions involved, although the same have been timely and properly raised with some emphasis.

ARGUMENT WHY THE WRIT SHOULD BE ALLOWED

This case involves fundamental Constitutional problems and inherent rights of private property ownership.

Petitioners are two among several other present owners of private real property being held responsible for the present and perpetual repair of public owned and public occupied docks on the basis of two ancient documents, (1837 and 1846), whereby an agreement in clear terms was made by the predecessor owners to repair contiguous public property in exchange for a tax exemption. A state scandal represented legally by a leading case in Pennsylvania law, *Mott et al.* v. *Pa. R.R. et al.*, 30 Pa. 9, (1858), thereafter brought a much needed change in the Pennsylvania Constitution, 1874, and tax exemptions became void. Most people, including lawyers, would regard this entire bargain or agreement as void.

Not so here. The original Borough of Erie taxes have increased, multiplied, and grown fruit through other types of municipal government taxes to be borne by petitioners at rates more than ample for the City or public to repair its or their own dock out of the City share alone (Record 14a), but the City now would have petitioners repair the public docks, and pay taxes, and, even further, repair not only contiguous dock as the agreement contained, but nearby public dock contiguous to City or public property only.

The almost unbelievable fact here is that once a single judge agreed with the City, and the federal issues or questions were therein immediately raised, each subsequent judicial body, apparently because the collateral factual background is complicated and dif-

ficult to present, and perhaps because of crowded calendars, refused to bother with the Constitutional problems, and affirmed without opinion.

Somewhere some Court should rule on the issues, as the facts, however difficult to present, are undisputed. Petitioners have no other forum to seek the recognition of their Constitutional rights other than to the Supreme Court of the United States.

I. The Agreement

Petitioners' predecessors in title purchased fee simple title to certain water lots on the Erie bayfront, and the right to build thereupon, pursuant to special statute of the Commonwealth of Pennsylvania in 1805 (Record, 9a, Act of 1805, sec. 6, 1805 Statute at Large of Pennsylvania, 1005, 1007).

Pursuant to this same Act of 1805 the Town of Erie had general taxing powers, as well as powers to charge tolls and wharfage.

In 1833 the Town was incorporated, the general taxing power was renewed for all objects of general utility and the Town authorized to extend further into the Bay, (Act of 1833, April 8, P. L. 275, Act No. 134). On the same day the state provided funds for a public pier, break-water, or sea-wall, (Act of 1833, April 8, P. L. 243, Act No. 123).

In 1837, (Record, p. 35a), the Town and the water lot owners entered into an agreement whereby the water lot owners in lines parallel to their original lines were to fill in shoreward or southward from the public pier, thereby creating taxable real estate, the chief consideration for which was that the owners would pay "such reasonable assessments and taxes as may

be assessed on their respective lots . . . for the purpose of keeping the public pier and bridge in repair," (Record, 40a).

This agreement caused difficulty by reason of interpretation of the reasonable tax clause, (Record, 44a), and was amended in 1846. Some streets and piers were re-located, but relative to the within litigation and generally, the lot owners agreed "in lieu of the reasonable taxes and assessments" in the 1837 contract, to repair and maintain the public pier, and a method of enforcement of this agreement by collecting with the annual tax duplicate, (Record, 46a-48a).

The public pier is twenty feet in width, a public dock and causeway, paved for motor vehicles generally, owned by the City of Erie, and constitutes an area of constant public use, (Record 119, 17a; and see diagram at 84½a). As contiguous or adjacent owners, petitioners have no special rights in the same, but only the free use and enjoyment thereof, (Record 38a, *Walker* v. *Erie*, 64 Pa. Superior Ct. 525, 529-530).

It is this repair duty that is now being enforced without regard to the tax exemption.

II. On the Taking

The imposition of a perpetual servitude against private property for the maintenance of public property is a taking of property. It directly reduces the market value of the private property, and the value of its use; it is a covenant to forever pay x dollars for the repair of the public property.

United States v. *General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 318

United States v. *Cress*, 273 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746

Lynch v. *United States*, 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434

Weems S. B. Co. v. *Peoples S. B. Co.*, 214 U. S. 345, 29 S. Ct. 661, 53 L. Ed. 1024

Armstrong v. *United States*, 364 U. S. 40, 46, 80 S. Ct. 1563.

16 Am. Jur. 2d, 692, sec. 364-365

III. Retrospective Act

To now enforce the unilateral side of a bilateral contract violates the Fourteenth Amendment.

Petitioners' predecessors in title entered into a contract then legal in 1837 or 1846. The tax exemption phase of the bargain was held illegal by case law in *Mott et al.* v. *Pa. R. R. Co. et al.*, 30 Pa. 9, in 1858, confirmed by the legislature of Pennsylvania by Constitutional change in 1874.

Whether this is called impairment of contract, ex post pacto, a retrospective act, it is repugnant to and violates the Fourteenth Amendment.

It is not unlike good old *Dartmouth College* v. *Woodard*, 4 Wheaton 514, 4 L. Ed. 629.

The unilateral enforcement operates here to take away property.

See also:

Truax v. *Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254

16 Am. Jur. 2nd 756, sec. 415, 416

IV. Interstate Commerce Clause

Petitioner Irene Markopolos operates a restaurant on the property and is not in interstate commerce. Petitioner R. D. McAllister & Son operate a yacht

brokerage, sales, and service, and are in interstate commerce, servicing many vessels from Buffalo, New York and Cleveland, Ohio, etc.

In *Cannon* v. *New Orleans*, 20 Wall. 577, 22 L. Ed. 417, the Supreme Court of the United States struck down a wharfage tax based on vessel tonnage as unconstitutional, stating further that a reasonable compensation could be exacted until such time as removed as a state power by Congress.

In *McNeely & Price Co. et al.* v. *Phila. Piers, Inc.*, 329 Pa. 113, the Supreme Court of Pennsylvania held by Act of Congress, of June 29, 1936, 46 U.S.C. Sec. 114, the federal government controlled the regulation of wharfage charges, and had thereby removed the state control within its lawful exercise of the interstate commerce clause.

Certainly the term "taxes and assessment" must mean wharfage taxes if not the more ordinary and clear meaning, ad valorem taxes.

If the Cannon case is still the law, then a perpetual lien for total maintenance cost of the public pier is hardly a reasonable exaction. If the McNeeley opinion controls, then again the repair promise for the wharfage tax must fall with the ability to charge a wharfage tax.

SUMMARY

The protection afforded by the Fifth (or Fourteenth) Amendment cannot be more clearly expressed than in the words of this Supreme Court in *Armstrong* v. *United States*, *supra*, 364 U.S. 46, 49:

> "The . . . Amendment's guarantee that private property shall not be taken for a public use with-

> out just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole. . . ."

In *Reed* v. *Erie*, 79 Pa. 346, in 1876, the Supreme Court of Pennsylvania, refused to uphold a paving lien for the causeway going down to these very same public docks against the same water lots because, as stated by Chief Justice Agnew, p. 353, it would be prevailing against private property for public needs. No constitution or Fourteenth Amendment was mentioned, but the principles are identical.

The lower Court that actually decided this case would have the water lot owners pay for the entire public structure. The costs of repair or sums involved are now quite substantial. With harbor growth and change over the next 100 years the possibilities become ominous. This is the very type of public burden to be prevented by the Fourteenth Amendment.

Respectfully submitted,

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